

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2009 MSPB 196**

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Docket No. SF-0752-08-0684-B-1

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**Moises U. Cabarloc,  
Appellant,**

**v.**

**Department of Veterans Affairs,  
Agency.**

October 2, 2009

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Moises U. Cabarloc, Sunnyvale, California, pro se.

Christopher P. McNamee, Esquire, San Francisco, California, for the  
agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review of a June 1, 2009 initial decision that affirmed his removal. For the reasons set forth below, we DISMISS the petition for review as untimely filed by 10 days with no showing of good cause for the delay.

**BACKGROUND**

¶2 The appellant, a Nursing Assistant at the Department of Veterans Affairs, filed an appeal of his removal for unauthorized absence. Initial Appeal File (IAF), Tab 1. The administrative judge originally dismissed the appeal as

untimely filed, IAF, Tab 10, and on the appellant's prior petition for review, the Board reversed and remanded the appeal to the regional office for further adjudication. *Cabarloc v. Department of Veterans Affairs*, [110 M.S.P.R. 695](#) (2009).

¶3 On remand, the administrative judge held a hearing on the appeal and then issued a new initial decision on June 1, 2009, sustaining the agency's charge and affirming the agency's decision to remove the appellant. Remand File (RF), Tab 9. On July 16, 2009, 10 days after the finality date of the initial decision, the appellant filed a petition for review. Remand Petition for Review File (Remand PFRF), Tab 1. The appellant did not address the apparent untimeliness of his petition. *Id.*

¶4 The Clerk of the Board issued an acknowledgment letter informing the appellant that his petition for review appeared to be untimely and, therefore, he was required to file a motion to accept the filing as timely and/or to waive the time limit for good cause, on or before August 5, 2009. Remand PFRF, Tab 2 at 1. The appellant did not respond to the Clerk's letter. The agency responded to the petition for review claiming that it was untimely with no good cause shown and there was no legal basis to grant the petition. Remand PFRF, Tab 3 at 2-3, 5, 7.

### ANALYSIS

¶5 A petition for review must be filed within 35 days after the date the initial decision was issued, or, if the appellant shows that he received the initial decision more than 5 days after it was issued, within 30 days after the date that he received the initial decision. *Williams v. Office of Personnel Management*, [109 M.S.P.R. 237](#), ¶ 7 (2008); [5 C.F.R. § 1201.114](#)(d). The appellant bears the burden of proof, by preponderant evidence, with regard to timeliness. *Perry v. Office of Personnel Management*, [111 M.S.P.R. 337](#), ¶ 5 (2009). Here, the initial decision informed the appellant that the decision would become final on July 6, 2009, unless a

petition for review was filed by that date or the Board reopened the case on its own motion.\* RF, Tab 9 at 7. As noted above, however, the appellant did not file his petition for review until July 16, 2009. Remand PFRF, Tab 1 at 8. Thus, his petition for review was untimely filed by 10 days.

¶6 The Board will waive the filing time limit only upon a showing of good cause for the delay in filing. *Williams*, [109 M.S.P.R. 237](#), ¶ 7; [5 C.F.R. § 1201.114](#)(f). To establish good cause for an untimely filing, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Williams*, [109 M.S.P.R. 237](#), ¶ 7; *see Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits, or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Williams*, [109 M.S.P.R. 237](#), ¶ 7; *see Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶7 The Board will find good cause for an untimely filing when a party demonstrates that he was unable to file his petition on time due to illness, or mental or physical incapacity. *See Stribling v. Department of Education*, [107 M.S.P.R. 166](#), ¶ 8 (2007). To establish that an untimely filing was the result of an illness, the party must: (1) Identify the time period during which he suffered from the illness; (2) submit medical evidence showing that he suffered from the alleged illness during that time period; and (3) explain how the illness

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\* The appellant has not alleged that he received the initial decision more than 5 days after it was issued. *See* [5 C.F.R. § 1201.114](#)(d).

prevented him from timely filing his petition or a request for an extension of time. *Id.*; *Lacy v. Department of the Navy*, [78 M.S.P.R. 434](#), 437 (1998).

¶8 In his petition for review, the appellant argues the merits of his case and asserts that he was unable to express himself well during the hearing because he was nervous. Remand PFRF, Tab 1 at 5-6. He also claims that the administrative judge failed to consider that he was “ill and depressed.” *Id.* He did not address the timeliness issue in his petition.

¶9 There is nothing in the record to explain the period of delay in this case. The agency’s opposition to the appellant’s petition for review provided him with explicit information regarding the legal standard to show good cause for waiver of the Board’s filing time limit based on illness under *Lacy*, 78 M.S.P.R. at 437, and the Clerk gave him the opportunity to submit additional evidence and argument on the timeliness issue, but the appellant failed to respond. PFRF, Tab 2 at 1, Tab 3 at 3. Thus, we find that the appellant has failed to establish good cause for his untimely filing based upon his asserted medical condition. Additionally, because the appellant failed to respond to the Clerk’s notice regarding timeliness, we find that he has failed to demonstrate diligence or ordinary prudence that would excuse his late filing. *See Perry*, [111 M.S.P.R. 337](#), ¶ 7; *Valdez v. Office of Personnel Management*, [103 M.S.P.R. 88](#), ¶ 7 (2006).

¶10 We note that, although the 10-day delay in this case is not especially lengthy, it is not minimal. *See Gonzalez v. Department of Veterans Affairs*, [111 M.S.P.R. 697](#), ¶ 11 (2009) (8-day delay in filing a petition for review is not minimal). In any event, we have consistently denied a waiver of our filing deadline if a good reason for the delay is not shown, even where the delay is minimal and the appellant is pro se. *E.g., id.*

#### ORDER

¶11 Accordingly, we dismiss the petition for review as untimely filed with no good cause shown for the delay. This is the final decision of the Merit Systems

Protection Board concerning the timeliness of the appellant's PFR. The initial decision remains the final decision of the Board concerning the merits of the appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

**NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.